HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO.17 OF 2002.
Against
FIRST APPEAL NO. 442 OF 1995.

1. The Municipal Corporation of
Greater Bombay, having its office
at Mahapalika Marg, Fort,
Bombay - 400 001.

2. The Ward Officer "R/N" Ward,
Municipal Corporation of Gr.Bombay,
Municipal Market Bldg,
Borivali (West), Bombay - 400 092. ..Appellant.

Versus.

1. Bharatiben Dhanesh Goragandhi,
r/at: Goragandhi Apartments,
S.V.P.Road, Borivali(West),
Bombay - 92.

2. Smt. Smita Raj Laliwala,
r/at: 5th Floor, Girichayya,
Apartment, Band Stand,
Bandra (w), Mumbai - 400 050.

3. Jayesh Dhanesh Goragandhi,
A-2, Goragandhi Apartments,
S.V.P. Road, Borivali(W),
Bombay- 400 092.

4. Miss. Disha Dhanesh Goragandhi,
A-2, Goragandhi Apartments, S.V.P.
Road, Borivali (W), Bombay - 92.

5. Ranjit Harilal Goragandhi,
Goragandhi Apartments, S.V.P.
Road, Borivali (W), Bombay - 92. ..Respondents.

Mr. K. K. Singhvi i/b Smt. Vidya Khatu for the appellants - BMC.

Mr. D. S. Parikh i/b Mr. V. R. Sutrale for the respondents.

CORAM: S.B.MHASE &
D.B.BHOSALE, JJ.

DATE: 6th May, 2005.

ORAL JUDGMENT (PER S.B.MHASE,J.):

1. This Letters Patent Appeal is directed against the judgment and order of the learned Single Judge of this Court in First Appeal No. 442 of 1995 decided on 19th December 2001.

2. The First Appeal No. 442 of 1995 has arisen from the decision of L. C. Suit No. 2506 of 1982 decided by the Bombay City Civil Court, Bombay on 16th-20th February 1995.

3. L.C.Suit No. 2506 of 1982 was filed by the respondents for a declaration that impugned proceeding adopted by the appellant under the provisions of the Bombay Town Planning Act in respect of the suit property being original plot No.9 (final Plot No.44) at Chandavarkar Road, Borivali (West) Bombay and also proposed action under sections 78 & 79 of the Bombay Town Planning Act under notice No. WOR/7 PH/F/338, 341 ,344, 348, 341, 344, 348/TD/35, all dated 12th December 1981 are illegal, bad in law and ultra-vires the provisions of the Maharashtra Regional Town Planning Act and that the respondents are not entitled to take any action under sections 88 and 89 of the said Town

Planning Act by virtue of a final scheme in respect of suit property, and further permanent injunction was claimed to the effect that peaceful possession of the respondents - original plaintiffs shall not be disturbed and that the notices referred to above, shall not be executed as against the respondents and their property.

4. The trial Court has framed as many as 17 issues. However, the trial Court found that the respondents are owners of the suit property. It is also found that original plot No. 9(final Plot No.44) under the said Town Planning Scheme, are the same plots owned by the respondents. It has recorded a finding that the suit property is not vested in the Appellants in the absence of acquisition proceeding under section 126 of the MRTP Act and thereby has recorded a finding that the notices bearing No. WOR/TPS/338/ TP/35, WOR/TPS/341/ TP/35 WOR/TPS/344/ TP/35 WOR/TPS/348/TP/35 dated 12th December 1981 are illegal and bad in law. Rest of the issues were answered to the effect that they 'do not arise for consideration,' and thus the suit was decreed as against the Appellants. The said decision in L. C. Suit No. 2506 of 1982 was challenged by filing First appeal No. 442 of 1995 which was dismissed by the learned Single Judge of this Court and therefore, this LPA, as stated above, challenging the said judgment of

the learned Single Judge.

5. The brief undisputed facts, which are crystalised from the proceedings below and which are not disputed before this Court, are as follows:-

(A). One Vallabhadas Goragandhi was the original owner of original Plot No.9, which was re-numbered as Final Plot No. 44 in T.P. Scheme for Borivali with four structures thereon. After the death of Shri. Vallabhadas, his son- Shri. Hiralal became the owner of the said plot. It appears that originally the said plot was under Borivali Municipal Council in Thane District. Under the Town Planning Act, 1919, Town Planning Scheme was prepared for Borivali with effect from 15th July 1919. In the year 1941, owner of the said plot Shri. Hiralal expired. Present respondents are the legal heirs of the deceased Shri. Hiralal.

(B) The Bombay Town Planning Act, 1919 was replaced by the Bombay Town Planning Act, 1954 and Borivali Municipal Council declared its intention in September

1956 to vary the scheme prepared earlier by it. The then Government of Bombay declared on 31st December 1956, the intention of Municipal Council to vary the scheme. Soon thereafter, i.e., from 1.7.1957, the Borivali Suburban became the part of Greater Mumbai and municipal Corporation of Greater Mumbai became the Planning Authority for that area. On 30th November 1959, by resolution No. 1108, the the Appellant No. 1 declared its intention to vary the said scheme under the Bombay Town planning Act, 1954 and such intention to vary the Scheme was published in the notification on 10.12.1959. On 21st January 1961, approved scheme was published and original plot No. 9 was re-numbered as final plot No. 44. The Appellants had informed to the Respondent No. 5 Shri. Ranjit Hiralal Goragandhi on 16.12.1961 that the said plot was reserved for public purpose. On 9.3.1962, the Government of Maharashtra sanctioned draft scheme (first variation) wherein Plot No. 9 (final Plot No. 44) was reserved for public purpose. The Arbitrator appointed under the Town Planning Act served notice upon Smt.

Jayantibai whose name was mentioned as owner of the said property in the Property Register Card. On 29th June 1962, two of the original plaintiffs made a representation to the Appellant No. 1 to release their land from reservation.

(C) The Maharashtra Town Planning Act, 1966 came into force with effect from 11th January 1967. The Appellant No.1 informed the Respondents herein on 26th December 1961 about the reservation of the Plot for public purpose. the Respondent No.5 with his brother appeared before the Arbitrator on 3rd January 1968. They filed a detailed statement before the Arbitrator on 8.2.1968 objecting the reservation of the suit plot for municipal offices. The Arbitrator by his order dated 10th April 1968, rejected the objections raised by the owners of the property and gave a decision of no change in the proposal. Meanwhile Smt. Jayantibai died on 11th January 1971. By his Award dated 9th June 1973, the Arbitrator gave his decision on the scheme under section 72(3) (xviii) of the MRTP Act, confirming the

draft scheme proposal of the reservation of the said plot for the purpose of Municipal Office. On 9th July 1973, the town planning scheme for Borivali(II) (1st Variation) (final) was published in the Government gazette.

(D) The said Award dated 9th June 1973 passed by the Arbitrator was challenged by the Respondents by filing an appeal under section 74 of the MRTP Act before the Tribunal. The said appeal was dismissed by the Tribunal. However, the rate of compensation was enhanced from Rs.15.60 to Rs.21.53 per sq. meter.

(E) The final scher sanctioned by the Government of Maharashtra on 17th July 1976 and the same was notified on 20th July 1976. The Town Planning Scheme as varied, came into effect with effect from 28th September 1976 by a notice dated 8th August 1978 the Respondents were called upon to collect the amount of compensation to the tune of Rs.1,17,918/- from the Ward Officer of the Appellants. the Appellants issued

notice under section 89 of the MRTP Act, calling upon the Respondents to remove the structure from the said property.

(F) The Respondents filed writ petition (Misc. Petition) No. 1084 of 1978 before the High Court on its Original side, challenging the notice as well as decision of the Arbitrator and the decision of the Tribunal on appeal, on the ground that the scheme was passed without serving notice on all co-owners. The above Misc. Petition No. 1084 of 1978 was dismissed by His Lordship Justice Pendse on 14th October 1981. Being aggrieved by the said judgment and order dated 14th October 1981 in Misc. Petition No. 1084 of 1978 the Respondents preferred Appeal No. 530 of 1981 which was summarily dismissed at the admission stage by the Division Bench of this High Court on 3.12.1981. the Respondents herein preferred leave to appeal to the Hon'ble Supreme Court but none of the parties reported the status of the said petition.

(G) The Appellants issued notice

under section 89 of the said Act which came to be challenged by the Respondents in Suit before the city Civil Court. By order dated 28th March 1988, the trial Court had rejected the plaint under Order -VII Rule 11(d) of the CPC 1908 on the ground that under section 149 of the Act, City Civil Court has no jurisdiction to entertain and try the said suit. the Respondents challenged the said order by filing an appeal No. 350 of 1988, which was allowed by this Court, whereby the impugned order of the City Civil Court was set aside and the suit was restored to the file to be heard and decided on its merit. The City Civil Court by its judgment and order dated 16th-20th February 1995, finally decreed the suit n favour of the Respondents and therefore First Appeal No. 442 of 1995 was filed by the Appellants, which was dismissed by the learned Single Judge on 19th December 2001 and therefore this LPA.

6. The learned Senior Counsel Mr. Singhavi raised three submissions on behalf of the Appellants. First submission was in respect of Section 149 of the MRTP Act, 1966 and thereby it was submitted that the

suit filed by the Respondents is not maintainable since the said provision states that "Save as otherwise expressly provided in this Act, every order passed or direction issued by the State Government or order passed or notice issued by any Regional Board, Planning Authority or Development Authority under this Act shall be final and shall not be questioned in any suit or other legal proceedings."

7. The second ground of attack was the point of res-judicata. It is submitted that the Respondents herein filed Writ Petition No. 1084 of 1978 before this Court which was dismissed by His Lordship Justice Pendse on 14th October 1981 and by the said proceeding, Writ of Certiorari for setting aside the proceeding in respect of original plot No..9, re-numbered as final Plot No. 44 and notice dated 10th August 1978, issued pursuant to the public notice of the final scheme were challenged. Since the said proceeding terminated in the dismissal of the said writ petition, the points which are raised in the present suit are barred by principle of constructive res-judicata.

8. Before we consider the third point raised, we find it appropriate to answer these two points because before the Single Judge, the Appellants were represented

by Mr. Walawalkar and the learned Single Judge recorded the concession given by Mr. Walawalkar on behalf of the Appellants in Paragraph No.15 of the said judgment, wherein it is stated that:

> "Shri. Walavalkar in his usual fairness has not pressed the point of res-judicata, which was pressed in service before the trial Court on the ground that the learned Single Judge of this court had at the interlocutory stage in appeal from order passed in the very same matter had observed that section 126 was required to be followed, Shri. Walavalkar has rightly not pressed the point of res-judicata as the learned Single Judge had made such observations while remanding the matter back to the trial Court for final decision and did not decide the point finally. By his order dated 28th August 1985, R. A. Jahagirdar, J. has observed that the City Civil Court will have to decide whether the final scheme in fact had come into force legally and that while deciding the question, the city Civil Court also has to decide whether proceeding under section 126 of the Act, has been resorted to. The

learned Judge had set aside the order of the Trial Court, rejecting the plaint at the threshold."

. Thus, from these observations, it is clear that point of res-judicata, though raised in the written statement by the Appellants, which was filed in the City Civil Court, was given up at the First Appeal stage and when such concession has been already given before the Single Judge, it is not proper on the part of the Appellants-Corporation to raise the said point again for re-cosideration. It is equally clear that on preliminary point, City Civil Court had held that L. C. Suit is not maintainable. However, the said judgement and order was set aide by the Single Judge in Appeal from Order and it was held that the suit is maintainable and further directions to consider the suit on merit was given. The said order was not further challenged and/or the issue in respect of Section 149 of the MRTP Act was not kept alive by the order of the Court, for the consideration of the trial court while disposing off the suit. Under these circumstances, we find that the submissions made by the learned counsel in respect of bar provided in Section 149 is not tenable and, therefore the first two submissions raised by the Appellants are hereby rejected.

9. The third submission, however, is in respect of main contentious matter between the parties. Mr. Singhavi, the learned counsel after having taken us through the provisions of the MRTP Act and more specifically the chapter-V in respect of framing of the Town Planning Scheme, has submitted that the said Chapter is a full and comprehensive provision for the preparation of the Town Planning Scheme. He submitted that once the town planning scheme is framed in accordance with the said chapter and brought into force, as per Section 88, the right, title of the original owner of the plot stands extinguished and land stands vested in the authority as per the reservation. The learned counsel submitted that Chapter-VII of the said Act is not applicable and more specifically, provisions of Section 126, which provide for acquisition of the land are not applicable. He relied upon two judgments of the Hon'ble Apex Court, namely, **AIR - 1969 SC 634 in the matter of State of Gujarat v/s. Shantilal Mangaldar and 2003(3) SCC 413 in the matter of Laxminarayan R. Bhattad and others v/s. State of Maharashtra.** He also relied upon the judgment of this Court in Writ Petition No. 510 of 1991 with Writ Petiton No. 6423 of 1996 in the matter of Zahir Jahangir Vakil & ors. v/s. Pune Municipal Corporation and Ors. and submitted that point

is no more in res-integra for this Court and therefore it is prayed that both the judgments under challenge be set aside and appeal be allowed and in the result L. C. suit be dismissed.

10. The learned Senior Counsel Mr. Parikh who appeared for the Respondents, submitted that above referred Supreme Court's judgments are not applicable to the facts and circumstances of the case since they are not the judgments under the present Act. He submitted that there is a head on collusion in section 86 & 88(a) on one hand and sections 126 & 127 of the MRTP Act on the other hand and such head on collusion will have to be reconcilled on the basis that said two sets of provisions of the Act operate at different stages and at a different point of time and in different situations.

11. According to the learned counsel Mr. Parekh, if the purpose for which the land is acquired for, by the Planning Authority is proposed to be fulfilled or achieved immediately, section 88(a) comes into operation and such land vests in planning authority on the final scheme being sanctioned. If, however, such public purpose is proposed to be achieved or fulfilled at a later stage, after Town Planning Scheme is sanctioned under section 86 of the said Act, the land reserved for

public purpose has to be acquired by the Planning authority in accordance with sections 125 & 126 of the Act. He submitted that the basis for grant of compensation for land acquired for final scheme, is value of such land on the date of publication of the notices by the State Government granting sanction to the draft scheme under Section 68(2) of the Act. However, basis for grant of compensation for the land acquired under section 126 of the Act is the value of the land on the date of publication of the notification under section 6 of the Land Acquisition Act and he submitted that said two criteria or bases for awarding compensation clearly indicate that sections 86 & 88(a) on one hand and Sections 125 & 126 on the other hand operate at different stages or at a different points of time, at different situations. He submitted that these sections can be harmonised only on the basis of section 86 and 88(a) on one hand and sections 125 & 126 on the other hand, operate at different stages or at different stage of a time depending on:

i) Whether the public purpose for which land is acquired by the Planning Authority is capable of being achieved or fulfilled immediately, or;

ii) Whether it is to be achieved or fulfilled at a future date.

. Thus, he tried to submit that if the land acquired is capable of being immediately put for public purpose, the provisions of sections 86 & 88 will govern the field. But if the land is not required immediately, sections 125 & 126 will govern the field.

12. The point which requires consideration by us is that when a Town Planning Scheme is framed and final scheme has been brought into force in accordance with law, after providing a compensation, as provided in the Town Planning Scheme, whether it is necessary to acquire such land again by following the procedure as provided under section 126 of the said Act.

13. This point as stated by the learned Senior counsel Mr. Singhavi, is no more res-integra for this Court. We have gone through the judgment of this Court delivered in Writ Petition No. 510 of 1991 in the matter of Jahir Jahangir Vakil & Ors. V/s. Pune Municipal Corporation. The Division Bench has observed after considering the Supreme Court judgements as follows:

> "In our view the ratio laid down by the Supreme Court in the aforesaid two judgments squarely covers the present case. However, both the learned counsel for the Petitioners have contended before us that the said judgments cannot be relied upon in the present case because those judgments arose under the provisions of the old Act and provisions of the Old Act, there was no provision similar to section 126 prescribing for the payment of compensation by following the Land Acquisition Act, 1894 in respect of the land sought to be acquired under the Town Planning Scheme. It was thus contended that the ratio laid down in the aforesaid judgment cannot be relied upon for determination of the issues raised in the present petition."

Further in paragraph 23 it is observed that:

> "The contentions of both the learned counsel thus, in our view is squarely answered by the aforesaid three judgments of the Supreme Court which inter alia holds :
>
> (i) that the scheme of the town

planning under the MRTP Act, 1966, is a scheme by itself and the provisions of compensation are inbuilt and govern within the said scheme,

(ii) the provisions of Town Planning Scheme provide for computation of compensation by the Arbitrator,

(iii) If a party is aggrieved by such compensation being fixed by the Arbitrator such a party has a right of appeal before the Tribunal under the provisions of the MRTP Act, 1966.

(iv) On the final scheme being sanctioned by the State Government under section 88(a), the property vests free of all encumbrances in the State Government and all rights of the original holders in the original plot of land stand extinguished,

(v) the rights of the are governed by the provisions of the said scheme and cannot be looked into outside the said scheme. However, in view of the further argument advanced by the learned counsel for the Petitioner that the first two judgments of the Supreme Court,i.e., in the case of State of Gujarat v/s. Shantilal Mangaldas & Ors (supra) and Prakash Amichand Shah v/s. State of Gujarat and others (supra) being under the provisions of the said Act and are not applicable. We will deal with the aforesaid argument in detail even though in our view the said argument is directly concluded by the judgment in the case of Laxminarayan N. Bhattad & Ors. v/s. State of Maharashtra & Another (supra).

. Further in paragraph 24 it is observed by the Division Bench that:

"The argument of the learned counsel for the Petitioner that the provisions of Section 126 also apply to the Town Planning Scheme is based on two premises. Firstly, that in the setting of the scheme and arrangement of the provisions of section 126 appears subsequent to the provisions of Chapter-V being Section 59 to 112 providing for the town planning scheme including the provisions of Section 88 providing for vesting of the land on the said scheme being sanctioned. It is thus argued that obviously therefore the provisions of Section 126 must apply even in respect of the properties which are sought to be acquired under the provisions of the Town Planning Scheme."

"In our view, the scheme of the Act is so far as pertains to Town Planning Scheme are concerned falls into three parts:

(i) draft town planning scheme,

(ii) proposed final town planning scheme.

(iii) Sanctioned town planning scheme.

In our view, the scheme of the Act further indicates that the provisions of town planning scheme contained in Chapter-V of the Act is a self-operative complete scheme by itself. It is like a self contained code. Thus, for the purpose of the compensation in respect of plots of land covered under the scheme and reserved or utilised for the public purpose under the scheme the Respondents are liable to resort to the provisions of Section 126 of the MRTP Act, 1966 and consequently acquire the same under Land Acquisition Act, 1894. The words 'town planning scheme' used under the provisions of sub-section (2) of section 126 is in respect of the town planning scheme which is yet not become final and sanctioned in exercise of power under section 86 by the State Government though published as final scheme for inviting objections under Section 67 of the MRTP Act, 1966. Thus the provisions of Section 126 (2) providing for acquisition of the land will apply prior to

the said town planning scheme is finally sanctioned under the provisions of Section 86 of the said Act of 1966. The said provisions are provided for as enabling provisions because if the planning authority desired to acquire the land under section 88(c) then such an enabling power is provided for by virtue of sub-section (2) of section 126 of the said MRTP Act, 1966. On such exercise under Section 126 of power the planning authority can acquire a land even before the final scheme is sanctioned under the provisions of Section 86 of the Act. These enabling provisions are provided for to take into an amergent eventualities where due to exigencies the State Government cannot wait till completion of entire procedure prescribed under Chapter-V and land is required for any urgent public purpose. Once such a method is applied then in that event the land will be acquired by applying section 126(2) of the said Act read with section 6 of the Land Acquisition Act. It is so because unless the final town planning scheme is sanctioned the property does not vest in the State Government under

Section 88(a) of the Act. Once the town planning scheme is finally sanctioned under section 96 and compensation is finally determined by the decision of the Arbitrator and the property vests under the provisions of section 88 in the State Government, the question of resorting thereafter to a further acquisition under section 126 (2) in our opinion would not arise. We are of the further opinion that if the provisions of Section 126(2) are read as an additional requirement in Chapter-V providing for town planning scheme then in that event even after the vesting of the land in the State Government under section 88 the State Government will have to resort to acquisition proceedings under section 126(2) of the said MRTP Act, 1966. In our opinion, such a construction of the scheme would be an absurd interpretation and make the whole scheme of the town planning meaningless."

. In paragraph No. 31, the Division Bench observed that:

"In the aforesaid circumstances, we hold

that the provisions of section 126(2) are not applicable in so far as the final sanctioned town planning scheme is concerned,.....

We further hold that a person whose plot is vested in the Government under section 88(a) of the town planning scheme being sanctioned scheme cannot thereafter seek an additional compensation by relying upon provisions of section 126(2) of the MRTP Act, 1966 and his rights including that of receipt of compensation for an area of his plot lost are governed by the final sanction town planning scheme particularly on the basis of the computation of the compensation quantified by the arbitrator under section 74 read with right of appeal under section 74 of the said Act of 1966."

And, thus writ petitions were dismissed.

15. Thus, by these judgments, the Division Bench of this court have concluded that if the final Town Planning Scheme has been sanctioned and brought into force after carrying out the process as stated in

Chapter-V, the provisions of Section 126, which appear in subsequent chapter, are not applicable. Applying this ratio to the facts in the present case, what we find that, it is an admitted position on record that town planning Scheme has been finalised and brought into force by carrying out necessary publications as provided in Chapter-V. We need not go to the repetition of the facts. Facts are already quoted in the earlier paras of this judgment, which make it crystal clear that final town planning scheme has been brought into force and vesting of the land with the Appellants has taken place as provided under section 88(a) of the Act. Not only that, the compensation which was fixed by the Arbitrator was challenged and Tribunal enhanced the amount of compensation. Thereafter, the notices for taking possession were issued, which was challenged by filing writ petition, which ultimately was dismissed. Thereafter again notices were issued for taking possession and those notices were challenged by instituting the present suit.

16. Applying the ratio laid down by the Division Bench, we find that issue involved in the present case, has been squarely answered against the Respondents. We accept and concur with the view expressed by the Division Bench of this Court in Writ Petition No. 510

of 1991 in the case of Zahir Jahangir Vakil & Ors V/s. Pune Municipal Corporation, and thereby we ultimately accept the submissions made by Mr.Singhavi, the learned Senior counsel and we find that the judgment delivered by the City Civil Court which was confirmed by the learned Single Judge of this court, is not proper, and therefore we hereby set aside the said judgment. Ultimately, the appeal will have to be allowed. We, therefore, pass the following order:-

O R D E R.

(1) Letters Patent Appeal No. 17 of 2002 is hereby allowed.

(2) The judgment and decree 16.2.1995/20.2.1995 passed by the City Civil Court, Bombay in Long Cause Suit No. 2506 of 1982 is hereby quashed and set aside. The judgment and order dated 19.12.2001 passed by the learned Single Judge of this Court in First Appeal No.442 of 1995, confirming the judgment and decree passed in Long Cause Suit No.2506 of 1982 is hereby quashed and set aside. Long Cause Suit No.2506 of 1982 is hereby dismissed with costs.

(3) This order shall remain stayed for a period of three months, so as to enable the appellants to approach the Apex Court, if so desired.

(D.B.BHOSAE,J.) **(S.B.MHASE,J.)**

:srp/2005/